EON BANK BHD

v.

JAFUONG PLYWOOD CORPORATION SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, SIBU
SANGAU GUNTING JC
[SUIT NO: 22-3-2001]
22 SEPTEMBER 2003

CIVIL PROCEDURE: *Writ of summons - Renewal - Application to set aside renewal granted - Whether plaintiff's usage of word 'abridge' instead of 'extend' in application to renew under O. 3 r. 5 RHC 1980 fatal - Whether renewal provision O. 6 r. 7(2A) mandatory - Whether maxim generalia specialibus non derogant applicable - Whether grounds for renewal sufficient*

These were the applications by the 2nd and 3rd defendants ('the defendants') to set aside two court orders pertaining to the renewal of the validity of the plaintiff's writ of summons. The plaintiff had earlier applied to renew the validity of the writ of summons when the writ was found to have expired after a court order set aside its service to the defendants. The defendants contended that the application to renew made after the writ of summons had expired was in breach of the mandatory provision of O. 6 r. 7(2A) of the Rules of the High Court 1980 ('RHC').

The issues, *inter alia*, were: (1) whether the plaintiff's usage of the word 'abridge' instead of 'extend' in its application to renew the writ of summons rendered the consequential order invalid; (2) whether O. 6 r. 7(2A) RHC was a specific provision and the maxim *generalia specialibus non derogant* was applicable; and (3) whether the plaintiff's grounds for the application to renew were insufficient.

Held:

[1] The plaintiff's usage of the word 'abridge' instead of 'extend' under O. 3 r. 5 RHC did not cause a substantial miscarriage of justice to the defendants. The defendants knew that the plaintiff at all material times actually intended to extend the time limited to make the relevant application. Therefore, the plaintiff's non-compliance with O. 3 r. 5 should be treated as an irregularity under O. 2 r. 1(1) and should not nullify the step taken in the proceedings and the consequential order granted. (p 482 d-e)

[2] The purpose of O. 6 r. 7(2A) RHC appears to be quite different from the purpose of O. 3 r. 5(1). While the former concerns the time when an application for renewal must be made, the latter concerns the court's discretion to extend or abridge that time. In the circumstances, O. 6 r. 7(2A) could not displace O. 3 r. 5(1). Therefore, the maxim *generalia specialibus non derogant* was inapplicable. (p 483 d-f)

[3] Although O. 6 r. 7(2A) RHC seems obligatory in that an application for renewal 'must' be made before the expiry of the writ, O. 3 r. 5(1) & (2) provides the court to extend or abridge such time as that contemplated by O. 6 r. 7(2A). Additional power to enlarge or abridge time is also provided by cl. 8 of the Schedule to the Courts of Judicature Act 1964. (pp 483 h & 484 a)

[4] As a result of the court order setting aside the service of the writ of summons, the plaintiff found itself in a difficult situation, *ie*, it had a writ of summons, which based on the said court order, was considered not served and which had expired. It followed that there were sufficient grounds for the court to have exercised its discretion to extend the validity of the writ of summons against the defendants. (pp 486 h & 487 a)

[Applications dismissed, defendants to enter defence within 14 days.]

Case(s) referred to:

Arab Malaysian Credit Bhd v. Tan Seang Meng [1995] 1 CLJ 773 CA ***(refd)***
DP Vijandran v. Majlis Peguam [1996] 1 CLJ 23 CA ***(refd)***
Harkness v. Bell's Asbestos & Engineering Ltd [1967] 2 QB 729 ***(refd)***
Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusof Mohamed [1997] 3 CLJ 332 HC ***(refd)***
Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***
Ratnam v. Cumarasamy & Anor [1965] 31 MLJ 228 ***(refd)***
Revici v. Prentice Hall Incorporated [1969] 1 WLR 157 ***(refd)***
Tjanting Handicraft Sdn Bhd & Anor v. Utusan Melayu (Malaysia) Sdn Bhd & Ors [2001] 3 CLJ 571 HC ***(dist)***
Westminster City Council v. Chapman [1975] 1 WLR 1112 ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 33(1)(h), 57(c)
Rules of the High Court 1980, O. 2 r. 1, O. 3 r. 5(1), (2), O. 6 r. 7(2A), O. 41 r. 6, O. 64
Rules of the Supreme Court 1965, O. 1A, O. 2 rr. 1, 3, O. 6 r. 7(2A)

Other source(s) referred to:

Malaysian High Court Practice 2001, Desk Edition, Malayan Law Journal, p 35 para 3.5.2

P St J Langan & DG Lawrence, *Civil Procedure,* Sweet & Maxwell, 2nd edn, pp 19-20

For the plaintiff - Arthur Lee Cheng Chuan; M/s Arthur Lee, Lin & Co
For the 2nd & 3rd defendants - Azrin Ahmat; M/s Idris & Co

Reported by Usha Thiagarajah

JUDGMENT

Sangau Gunting JC:

The plaintiff's claim is based upon facilities granted to the 1st defendant. The facilities consist of overdraft, term loan and bankers acceptance respectively in the sum of RM3,377,743.51, RM479,050.94 and RM3,316,034.51. The 2nd defendant's liability arises from its having allegedly defaulted on a Guarantee by a Corporation dated 18 September 1997. The 2nd defendant guaranteed payment to the plaintiff of all money owing by the 1st defendant to the extent of RM10,000,000, "in consideration of the plaintiffs agreeing to make or continuing advances or otherwise giving credit or affording banking facilities and accommodation to the 1st defendant at the 2nd defendant's requests." The 3rd defendant's liability is based on a guarantee dated 11 January 1999, executed by him in favour of the plaintiff, whereby the 3rd defendant "guaranteed payment to the plaintiffs of all money owing by the 1st defendant to the extent of RM685,623.81."

On 6 February 2001 an *ex parte* summons in chambers (SIC) seeking leave to serve the writ of summons on the 2nd and 3rd defendants "out of the jurisdiction", by sending the same by pre-paid post, was heard and granted by the learned senior assistant registrar. Having been so served with the writ of summons, each of the 2nd and 3rd defendants applied for and was granted leave to enter a conditional appearance. Thereafter each of the 2nd and 3rd defendants filed an application, *inter alia,* to set aside (a) the order for service out of the jurisdiction obtained on 6 February 2001, (b) the purported writ of summons dated 6 February 2001, and (c) the purported service of the writ of summons dated 6 February 2001.

Subsequently the learned High Court judge, his Lordship Datuk Clement Skinner ruled that "the order for service out of the jurisdiction ... obtained on *ex parte* basis ... on 6 February 2001 was a nullity, having been obtained independent of the rules of the court ... the service of the writ on the 2nd and 3rd defendants ... must be set aside with costs ..."

Thereafter, by way of a SIC dated 16 April 2002 (encl. 142) the plaintiff applied for and was granted a renewal of the validity of the writ of summons dated 6 February 2001 for two consecutive periods, "each of six months, the first period of renewal to commence from the date of its expiry on 5 August 2001 and the second period of renewal to commence from the date of its expiry on 5 February 2002" (encl. 148). Concerning the 3rd defendant, the plaintiffs by way of a SIC dated 6 August 2002 (encl. 186) applied for and was granted a further six months' renewal of the writ of summons dated 6 February 2001 commencing from 6 August 2002 (encl. 189). In both applications (encls. 142 and 186), the plaintiffs included a prayer for an order, "that the time limited to make this application be abridged to the date of this summons in chambers *(ex parte)* ..."

The grounds of the application were substantially that the service of the writ of summons dated 6 February 2001 on the 2nd and 3rd defendants on 16 February 2001 was set aside, the plaintiffs still wished to proceed with the claim in the action against the 2nd and 3rd defendants, and that the non-service on the 2nd and 3rd defendants were not intentional. The relevant summonses in chambers are supported by the affidavits of the plaintiff's advocates dated 15 April 2002 and 5 August 2002 (respectively by Authur Lee Cheng Chuan and Siew Chen Fui).

Inter alia, the said plaintiff's affidavit dated 15 April 2002 says, "(a) the material time there was no need to extend the writ of summons, as the 2nd and 3rd defendants' application to setting (sic) aside the service of the writ of summons on them was not yet disposed and had they been unsuccessful, there was no need to re-serve the 2nd and 3rd defendants." Here, by "the material time" the plaintiff appears to be referring to the period of time between 15 February 2001 and 4 April 2002. 15 February 2001 was the day the service of the writ of summons was effected on both defendants pursuant to the Court Order for service out of the jurisdiction dated 6 February 2001. 4 April 2002 was the day when the said Court Order dated 6 February 2001 was set aside. The plaintiff's said affidavit further states the non-service of the writ of summons on both defendants was caused by the Court Order dated 4 April 2002, and was therefore, not intentional. Concerning the 3rd defendant, the ground for further extension was averred, in substance, to be the 3rd defendant's 'non-presence' at the "appointed time ... on 2 August 2002 at 10.30am."

The Defendants' Applications

By their respective SIC respectively dated 1 July 2002 (encl. 178) and 15 November 2002 (encl. 230), each of the 2nd and 3rd defendants seeks, *inter alia*, to have the Court Orders dated 18 April 2002 (encl. 148) and 6 August 2002 (encl. 189), extending the validity of the writ of summons together with the statement of claim dated 6 February 2001, set aside.

The defendants say the said writ of summons and the purported service thereof should be set aside, because the said writ of summons is "invalid, ineffective and/or a nullity." The purported renewals of the said writ of summons, the defendants contend, "are ineffective and/or a nullity since the applications for the said renewals were made in breach of O. 6 r. 7(2A) of the Rules of the High Court 1980." The 3rd defendant supports his application with his affidavit affirmed on 14 November 2002. The 2nd defendant's application is supported by an affidavit dated 27 June 2002 affirmed by the 3rd defendant, being a director of the 2nd defendant.

The Defendants' Applications Considered

The Basis Of The Defendants' Applications

It appears undisputed that the plaintiff's *ex parte* SIC dated 16 April 2002 was filed after the expiry of the writ of summons. After the initial two renewals, each of six months, the same writ expired on 5 August 2002, thereby making the filing of the application to renew it on 6 August 2002, out of time. Quite clearly, if the initial order dated 18 April 2002 extending the validity of the said writ were to be ruled invalid, then the subsequent renewals would be invalid as well.

The defendants say O. 6 r. 7(2A) of the Rules of the High Court 1980 ('the RHC') "in clear language prohibits the filing of an application for renewal after the expiry of the writ." They also say O. 6 r. 7(2A) is a specific provision "which will override any general provision ..." Hence, they contend, O. 3 r. 5(1) of the RHC "will not be applicable." The defendants emphasised on the word 'must' in O. 6 r. 7(2A) of the RHC, and imply that compliance with the said rule is mandatory.

The plaintiff's *ex parte* SIC dated 16 April 2002, the defendants say, "is in clear breach of said O. 6 r. 7(2A) (RHC)." Thus, they contend, "the *Ex-parte* Order dated 18 April 2002 purportedly renewing the validity of the writ for 2 consecutive periods is invalid and/or a nullity since it was **made independent of the rules** of court" (emphasis added).

Next, the defendants attack the wording of prayer (2) of the plaintiff's SIC dated 16 April 2002. Implied in the submission is, that the plaintiff should have, presumably *mutatis mutandis*, used the word 'extended', instead of 'abridged'. They say, "(i)nstead of obtaining an order to extend the time limited by the plaintiff to file an application to renew the writ, the plaintiff obtained an order to 'abridge' time." The defendants contend, "to 'abridge' means to 'shorten' and the Ex-parte Order dated 18 April 2002 purportedly 'abridging'

the time limited to make the *ex parte* application by the plaintiff is illogical, a nullity and of no legal effect." They say, that even if the plaintiff were to be held "entitled to apply for an extension of time to make an application for renewal of the writ to overcome O. 6 r. 7(2A) of the RHC, ... the plaintiff have blatantly failed to make such an application to 'extend' time ... the prayer and order for 'abridgment' of time is invalid and a nullity."

'Extension' Versus 'Abridgment'

The initial expiry of the writ of summons in question was on 5 August 2001. The second expiry was on 5 February 2002. Strictly, therefore, based on O. 6 r. 7(2A) RHC, any application for renewal must be made before 5 August 2001. In the instant case, the application for renewal was filed in on 16 April 2002, more than eight months after the expiry date.

Clearly, pursuant to an application for renewal made before the expiry of the writ of summons, the court could 'extend' the validity of the writ. But, what if the application for extension is made after the expiration of the writ? The answer seems to be the combined reading of O. 3 r. 5(1) and (2) of the RHC. But the defendants contend as "invalid and a nullity" the plaintiff's prayer in their SIC dated 16 April 2002 "that the time limited to make this application be **abridged** to the date of this summons in chambers ..." (emphasis added). This prayer they say is "echoed" in the Ex-parte Order thereafter obtained, thereby also rendering that Court Order "invalid and a nullity."

It seems this contention depends entirely on (a) whether the plaintiff's usage of the word 'abridge' was, in the circumstances, correct, and (b) if the usage of 'abridge' is erroneous or misconceived, whether such usage caused injustice to the defendants which render invalid and null the plaintiff's relevant prayer and the resultant court orders. In other words, the issue becomes whether the usage of 'abridge' instead of 'extend', which clearly appears to be the one and only other choice available in O. 3 r. 5(1) RHC, constitutes a non-compliance with the said O. 3 r. 5(1), which cannot be cured under O. 2 r. 1 of the RHC.

To the defendants, "it cannot be disputed that "'abridge' means to 'shorten'." In support, *Longman Dictionary of Contemporary English*, 3rd Edition and *Webster New Dictionary and Thesaurus*, Concise Edition were referred to. And they submit "(i)nstead of obtaining an order to extend the time limited by the plaintiff to file an application to renew the writ, the plaintiff obtained an order to 'abridge' time."

There appears to be not much room to argue on the dictionary meaning of the word 'abridge'. Now, the opposite of 'abridge' is 'expand' (*Oxford Dictionary of Synonyms and Antonyms*, Oxford University Press © 1999). And 'expand' basically means "to make ... greater in extent ..." (*Collins Concise English Dictionary*, Harper Collins Publishers 3rd edn 1992). In the circumstances the plaintiff found themselves in, and in the context of O. 3 r. 5(1) of the RHC, it seems very clear as earlier indicated, that in formulating prayer (2) of their application dated 16 April 2002, the plaintiff had only two choices of words to be used: either 'abridge' or 'extend'. In other words, in the circumstances, if it was not one of those two words, it **must** be the other.

Perhaps, it would be helpful to compare the situation in the instant case to the situation in *Revici v. Prentice Hall Incorporated* [1969] 1 WLR 157. In that case "Master Jacob gave a written decision against the plaintiff (in connexion with the service of notice of writ outside the jurisdiction) on 5 April. By his opponent's consent, the plaintiff was given 11 weeks in which to appeal from the master to the judge. On 19 July well out of time, he served his notice of appeal. Eveleigh J refused to allow him an extension of time, and the Court of Appeal affirmed his decision" (see *Civil Procedure*, 2nd edn (Sweet & Maxwell) by P St. J Langan and DG Lawrence pp. 19-20). *Revici v. Prentice Hall Incorporated* also concerns an application to extend the time in which to appeal ie, from at the end of the 11th week to 19 July.

In the instant case, the time limited for making an application for renewal of the writ had expired more than eight months prior to the plaintiff making the said application. In other words, the plaintiff should have made the application for renewal of the writ prior to its expiry on 5 August 2001. Instead, the plaintiff made the said application more than eight months later. In the *Revici* case *(supra)*, the period from the end of the 11th week by which time the notice of appeal should have been lodged, to the time the notice of appeal was actually lodged ie, 19 July, seems to constitute the subject-matter of the application for an extension of time which was refused by Eveleigh J. By analogy, the period from the time when the application for renewal of the writ should have been made ie, prior to 5 August 2001 to the time when the said application was actually made ie, about eight months after the 5 August 2001, must necessarily be referred to as an extension of time.

So it does appear, that in the instant case, the plaintiff seems to have stretched the time limited for the making of the application for extension from prior to 5 August 2001 to 16 April 2002, yet in the said application the plaintiff applied for an order "that the time limited to make this application be **abridged**" (emphasis added). So by the usage of the word 'abridge' the probable perception thereby portrayed, seems to be that the plaintiff is asking to abridge time which

was already 'out of time'. With respect, the contention of the learned counsel for the defendants concerning this issue, is correct, and that the said application should have been for an extension, and not for an abridgment of time.

Learned counsel for the plaintiff says there is no legal definition of 'to abridge'. In his written submission dated 7 July 2003 para. 15, he contends: "By popular understanding abridgment is granted as a means to permit application made outside time **as if it were made in time** (emphasis added). Therefore ... the usual practice in court in an application to extend time, made out of time is to also make, an application to abridge time at the same time." In the *Revici* case earlier referred to, the appeal notice was also served "well out of time", and yet the application that the plaintiff be allowed to serve the relevant appeal notice "out of time", was referred to as an application presumably for "an extension of time."

In the circumstances, with respect, it seems the correctness of the statement, "the usual practice in court in an application **to extend** time, made **out of time** is to also make, an application **to abridge** time **at the same time** (emphasis added), is rather doubtful. In Civil Procedure Sweet & Maxwell © 1976 at p. 19, the learned authors P.St.J. Langan and D.G. Lawrence, said "Applications for the abridgment of time 'are rare, except by consent, and, in practice almost limited to leave to serve short notice of certain urgent proceedings where no injustice would thereby be caused to the other party" (see *Supreme Court Practice* 1976, para. 3/5/2 as referred to by the learned authors and also *Malaysian High Court Practice* 2001 Desk Edition, Malayan Law Journal, p. 35 para. 3.5.2).

Be that as it may, notwithstanding the usage of the word 'abridged' in the plaintiff's SIC dated 16 April 2002 (encl. 142) and in the resultant court order dated 18 April 2002 (end. 148), the ultimate purpose for which the said application was made and the effect of the resultant court order is clear: that it was for the purpose of renewing the validity of the writ dated 6 February 2001 against the 2nd and 3rd defendants and that, consequential to the said application, the writ's validity was actually extended for two consecutive periods. In the 3rd defendant's case, a similar extension application was made by a SIC dated 6 August 2002 (encl. 186), and a similar extension order (encl. 189) was granted by the court on the same day. The 2nd and 3rd defendants seek to have precisely these court orders set aside, by their respective summons in chambers dated 1 July 2002 (encl. 178) and 15 November 2002 (encl. 230).

In the circumstances, the defendants knew precisely the nature of the plaintiff's application and the resultant court orders which they sought to challenge. And it seems quite reasonable and fair to infer, that notwithstanding the incorrect, or perhaps, more accurately, misconceived usage of the word 'abridge', based on the plaintiff's applications and the defendants' corresponding response to the resultant court orders, the defendants knew that prayer (2) of the plaintiff's applications was for an extension of time, and that the corresponding part of the resultant court order was intended to mean none other than to extend rather than to abridge the time limited for making the application for extension. After all, it seems glaringly clear, that in the circumstances, only when such an extension is granted, could the plaintiff proceed with their main objective of seeking renewals of their writ of summons.

To recap, in the circumstances and based on the nature and tenor of the defendants' challenge concerning the plaintiff's application and the resultant court orders, the irresistible inference has to be, that although the plaintiff was erroneous in their usage of the word 'abridge', the defendants knew at all material times, the plaintiff's main and ultimate intention ie, to be allowed to apply for renewals of their writ of summons. And similarly, the defendants knew, that for that purpose the plaintiff had to apply for leave to be allowed to make the relevant applications (encls. 146 and 186), despite of the time limited to do so having expired.

As earlier mentioned, in the context of O. 3 r. 5(1) of the RHC upon which the plaintiff's application is based, it would appear that the one and only other choice available to the plaintiff is the word 'extend'. In having granted the application in terms, the learned deputy registrar appears to have shared the plaintiff's view, that the prayer to abridge the time limited to make the said *ex parte* application was appropriate. As a result, the plaintiff did obtain the intended orders for renewals of the writ of summons. In the circumstances, the irresistible inference is, that the defendants must be taken to have known at all material times, that the plaintiff's usage of the word 'abridge', albeit, erroneous or misconceived, was intended to attain none other than an extension of the time limited to make the relevant application.

In this connection, by analogy, the example (*Westminster City Council v. Chapman* [1975] 1 WLR 1112) cited by Denning, MR in *Harkness v. Bell's Asbestos & Engineering Ltd.* [1967] 2 QB 729 (see *Civil Procedure* by P.St.J. Langan and D.G. Lawrence *(supra)*) seems quite pertinent:

> It can at last be asserted that 'it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.' That could not be said in 1963 ... But it can be in 1966. The new rule does it.

Westminster City Council v. Chapman [1975] 1 WLR 1112 (on the equivalent provision in the County Court Rules) is a good example. A bailiff who was serving summary proceedings for possession against squatters failed to affix the relevant papers to the main door or other conspicuous part of the house, as required by the Rules. He merely pushed an envelope containing the documents through the letter-box. All the squatters in fact got to hear of the summons and all attended the hearing. The Court of Appeal (by a majority) held the bailiff's mistake was an irregularity only and had been cured by the fact that everyone had notice of the hearing.

The passage quoted was said by Denning MR in relation to O. 2 r. 1 of the Rules of the Supreme Court 1965, which is similar to O. 2 r. 1 of the RHC. The question arises whether, in the circumstances of the instant case, the non-compliance of O. 3 r. 5(1) of the RHC, ie, the misconceived usage of the word 'abridge', occasioned a substantial miscarriage of justice and therefore it cannot be treated as an irregularity under O. 2 r. 1 of the RHC. As earlier discussed, in the circumstances of this case, it appears that, other than having unnecessarily been put into a situation of having to mull and argue on the legality and/or logic or otherwise of the usage of the word 'abridge' and 'abridgment' in the plaintiff's applications and the resultant court orders, the plaintiff's wrong choice of word did not cause a substantial miscarriage of justice. As earlier discussed, the defendants knew that the plaintiff's usage of the word 'abridge', which turned out to be misconceived and inappropriate, was at all material times, actually intended to extend the time limited to make the relevant *ex parte* application. Therefore, and keeping in mind O. 1A and O. 2 r.3 of the RHC, the plaintiff's non-compliance with O. 3 r. 5 of the RHC, could be treated as an irregularity under O. 2 r. 1(1) of the RHC, and "shall not nullify the ... step taken in the proceedings ... (and the consequential) ... order ... (granted)."

Whether Generalia Specialibus Non Derogant Applicable

Concerning O. 6 r. 7(2A) of the RHC, the defendants say it is specific and therefore "will override any general provision ..." In the circumstances, they say, "O. 3 r. 5(1) of the RHC 1980 ... will not be applicable." The defendants did not specifically state, but it seems implicit in their submission that the said O. 3 r. 5(1) is a general provision and must give way to the "specific" O. 6 r. 7(2A). Among the cases cited in support is *DP Vijandran v. Majlis Peguam* [1996] 1 CLJ 23.

With respect, it seems to me that the *DP Vijandran* case is distinguishable from the instant case, in that the nature of the provisions under consideration in that case is different from the nature of the provisions under consideration in the instant case. There, the issue would appear to be whether the Majlis

Peguam, in refusing to issue a sijil annual, could invoke its purported wider power to refuse sijil annuals generally under s. 57(c) of the Legal Profession Act 1976 when there is a specific provision which caters for such a situation ie, s. 33(1)(h) of the same Act.

Order 6 of the RHC 1980 concerns "general provisions" relating to writ of summons (see its heading). Under O. 3 of the RHC are provisions relating to "time". Order 6 r. 7(2A) of the RHC says "(a)n application for renewal must be made before the expiry of the writ ..." And the said O. 3 r.5(1) says **"the period within which a person is required ... by these rules ... to do any act in any proceedings"** may be extended or abridged by the court, "on such terms as it thinks fit" (emphasis added). It seems quite clear, that the 'period' in the emphasised phrase includes the time limited for making an application for renewal of a writ. So in that sense, O. 3 r. 5(1) seems just as specific as O. 6 r. 7(2A)of the RHC.

In any case, the purpose of O. 6 r. 7(2A) seems to be quite different from the purpose of O. 3 r. 5(1). While the former concerns the time when an application for the renewal of a writ 'must' be made, the latter concerns the court's discretion to 'extend' or 'abridge' that time. In the *DP Vijandran* case, both ss. 57(c) and 33(1)(h) seem invocable to justify the decision to refuse the issuance of the relevant sijil annual. It was a matter of interpretation to determine the more specific as opposed to the general provision. And having so determined, the Court of Appeal in that case, held "that the correct approach is to treat the general provision as having been displaced by the more specific." But in the circumstances of the instant case, due to each provision having a different purpose, how could it possibly be justified to 'displace' O. 3 r. 5(1) with O. 6 r. 7(2A)? In the circumstances of the instant case, with respect, I do not think the Latin maxim *generalia specialibus non derogant* is applicable.

In *Majlis Peguam & Another v. Tan Sri Dato' Mohamed Yusof Mohamed* [1997] 3 CLJ 332, Edgar Joseph Jr. FCJ said:

> It is true that on general principle, where a statute regulates the exercise of a right or power, or the use of a prescribed procedure, express reference to time being made, there is a marked inclination on the part of the Court to regard the relevant provision as obligatory **unless a power of extending or abridging the time is given to the Court**. (emphasis added).

In the instant case, while O. 6 r. 7(2A) of the RHC seems obligatory, in that an application for renewal 'must' be made before the expiry of the writ, O. 3 r. 5 sub-rr. (1) and (2) of the RHC does provide power to the court to extend or abridge such time as that contemplated by the said O. 6 r. 7(2A). Additional power to enlarge or abridge time is also provided by cl. 8 of the schedule to

the Courts of Judicature Act 1964 (Act 91). In the circumstances, with respect, I do not think it could be said, that the *ex parte* order of the court made on 18 April 2002 renewing the validity of the writ was made "independent of the rules of court."

Plaintiff's Grounds For Application: Whether Sufficient

Next the defendants argued, "the plaintiff have failed to provide good and sufficient grounds for the *ex parte* application." Implicit in the written submission of the learned counsel for the plaintiff dated 7 July 2003 is, that despite of the wordings of O. 6 r. 7(2A) of the RHC, "the renewal of a writ is at the discretion of the court when good reason (sic) are provided ..." The plaintiff through their advocate in an affidavit dated 25 November 2002 (para. 9) averred as to the reason for the necessity to extend the writ thus: "because the deponent (sic) had successfully raised a preliminary objection and set aside an earlier service of the said writ on him (3rd defendant), hence the subsequent application to extend it and abridgment of time to do so. If the defendants were unsuccessful in their preliminary objection, the 3rd defendant who has physically received the original writ and there would be no need to extend the same. The defendants' (sic) extensive use of affidavits to lengthen the time taken to dispose of the preliminary objection was the reason why the writ had by then expired."

The aforementioned reasons are to some extent reflective of the grounds given in the affidavit dated 15 April 2002, supporting the plaintiff's application to extend the validity of the writ of summons dated 6 February 2001 against both defendants. Concerning the plaintiff's subsequent application to extend the validity of the said writ against the 3rd defendant ie, for six months commencing from its expiry on 5 August 2002, the ground given was basically that "the non-service on the 3rd defendant was not intentional." Among the matters averred to in the supporting affidavit dated 5 August 2002 was that, although there was an appointment to effect service of the writ upon the 3rd defendant, service could not be effected as "(the 3rd defendant) was not there." Implicit in the plaintiff's affidavit dated 25 November 2002 (encl. 234, para.5) opposing the 3rd defendant's application (encl. 230) seems to be an allegation, that the 3rd defendant's non-presence on the appointed date and time (2 August 2002 at 10.30am) was intentional. The plaintiff pointed out that 2 August 2002 was three days short of the expiry, and that the day was followed by Saturday and Sunday, "therefore giving the plaintiff no chance to renew the said writ before its expiry." The 3rd defendant's averment pertaining thereto was briefly, that he did wait until 11am at his residence but no one turned up to serve upon him the writ. Anyway, the only thing that seems certain is, that there was an attempt by the plaintiff, albeit unsuccessfully, to serve the writ upon the 3rd defendant at an agreed place, date and time.

The defendants say the plaintiff "had taken improper steps to obtain an invalid order to serve "out of jurisdiction". The plaintiff having unsuccessfully "opposed the 2nd defendant's application to *inter alia* set aside the service of the writ", the defendants contend, the plaintiff "cannot take advantage of its own wrong. The plaintiff .... cannot rely on its own misapprehension of the law as a good basis for an extension of time." Cited in support of this submission is *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn. Bhd.* [1999] 3 CLJ 577. Part of the passage quoted from a judgment of the Court of Appeal is as follows: "... there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context."

In *Pentadbir Tanah Daerah Petaling* the issue was whether the respondent ought to be compensated for the loss of a warehouse which has been constructed on the subject land. It was held the respondent ought not to have any compensation as, "in the admitted absence of planning permission", the construction of the said warehouse amounts to an unlawful act. In *Pentadbir Tanah Daerah Petaling*, the absence of planning permission, which was the cause of the unlawful act of construction of the warehouse, was admitted. In the instant case, what the defendants labelled as the plaintiff's "misapprehension of the law" referring to the plaintiff's application to obtain an invalid order to serve "out of jurisdiction," was contested, albeit unsuccessfully, by the plaintiff.

In that context, the instant case is distinguishable from *Pentadbir Tanah Daerah Petaling*.

The defendants' submission, it is to be recalled, is that "(t)he plaintiff in the present case cannot rely on its own misapprehension of the law as a good basis for an extension of time." Now, 'misapprehension' comes from the word 'misapprehend', and 'to misapprehend' means 'to misunderstand' (*Collins Concise English Dictionary*, 3rd edn 1992, Harpers Collins Publishers). Now, a situation where in compliance with the law, it is clearly obligatory to first obtain a planning permission before proceeding to construct a building, would appear to be glaringly different from a situation, as in the instant case, where a party pursues a course of action thinking it is well within the parameters of the relevant provisions of the applicable laws.

The word 'misapprehension' itself seems to imply 'innocence' or, at least, *'bona fides'*, in the sense that the plaintiff did not adopt the course of action as they did knowing it was wrong or worse still, 'illegal' to do so. There is no suggestion, at all, from the defendants, that the plaintiff persisted with their application for leave to serve the writ of summons "out of jurisdiction" knowing that such a procedure is clearly wrong and contrary to law. Indeed, it would

appear that the plaintiff commenced and thereafter pursued the said application, based, as eventually it turned out to be, on their having 'misapprehended' the relevant laws. And it seems fair to infer, that only on the judgment day (4 April 2002) did the plaintiff fully realized, not only that they were wrong in their pursuit of the said course of action as they did, but also that such course of action resulted in the ensuing order for service 'out of jurisdiction' being adjudged, not just an irregularity but a nullity, incapable of being cured by O. 2 RHC.

In the circumstances, the question arises, whether the plaintiffs are entitled to assume, that the service of the writ of summons 'out of jurisdiction' was to be treated as still valid unless and until it was set aside. In the instant case, prior to the judgment of the learned High Court judge concerning the defendants' appeal to the judge in chambers, a decision to renew the validity of the writ of summons which was already served on the defendants could arguably be considered as prejudging the issue or issues pending decision by the learned High Court judge. Furthermore, if the plaintiffs were to have eventually won concerning the defendants' appeal to the judge in chambers, and had the plaintiffs initiated steps to renew the writ of summons prior to the delivery of judgment, they would have thereby incurred costs and time loss for which they themselves could arguably be held responsible.

Learned counsel for the defendants submitted in the combined written submissions dated 13 June 2003 pertaining to both defendants: "A *fortiori*, with reference to (I think here he means paras. 6 and 7 of Arthur Lee Cheng Chuan's affidavit dated 15 April 2002, not 15 November 2002) we submit that the plaintiffs have directly and/or indirectly placed the blame on the Court Order dated 4 April 2002 for the plaintiff's **predicament** when it was the plaintiff who unsuccessfully defended the invalid and improper order for leave to serve out of jurisdiction." (emphasis added). In reply, learned counsel for the plaintiffs in his written submission dated 16 May 2003 said: "... I wish to clarify that the plaintiffs has never meant to place any blame on the Court Order dated 4 April 2002. It is submitted that in respect of the 3rd defendant, every reasonable efforts was made by the plaintiffs' advocates to serve the said writ personally on him but failed to do so as duly explained in Arthur Lee's affidavit."

From the defendants' own submission, it seems they concede that consequential to the Court Order dated 4 April 2002, the plaintiffs found themselves in a 'predicament'. This simply means the plaintiffs found themselves in a difficult situation. With respect, to say that as a result of the said Court Order the plaintiffs found themselves in a difficult situation, is not precisely the same as saying the plaintiffs are placing blame on the Court Order for their predicament.

After all, keeping in mind the plaintiffs' earlier predicament whether or not to renew the writ "at the material time" (see para. 4 of plaintiffs' written submission dated 16 May 2003), it is a fact, that as result of the Court Order dated 4 April 2002 the plaintiffs did find themselves in a difficult situation: that is, they found themselves holding a writ of summons which, based on the said Court Order, must be considered unserved, and the validity of which had expired since 5 August 2001.

It was, *inter alia*, held by the Court of Appeal in *Arab-Malaysian Credit Bhd. v. Tan Seang Meng* [1995] 1 CLJ 773 (per Gopal Sri Ram JCA) that:

> (1) Under O. 6 r. 7 of the Rules of the High Court 1980 ('the RHC'), the court has jurisdiction to extend a writ even after its expiry. Whether that jurisdiction ought to be invoked in a given case is a matter within the discretion of the court hearing an application to extend.
>
> (2) Quite apart from O. 6 r. 7 of the RHC, there is wide power under O. 3 r. 5 conferred upon the High Court to extend time. Even the restriction on granting more than one extension of 12 months expressed in O. 6 r. 7 may, in appropriate cases, be overcome by having resort to O. 92 r. 4 which reserves the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.
>
> (3) A rule of court should not be construed so as to produce unfairness or a manifest injustice. The High Court thus has ample jurisdiction to grant the plaintiff in this case the several extensions sought by it of its writ and the judge was clearly wrong in holding that the court had no such jurisdiction. To say that a court has no power to make an order or to grant relief is quite different from saying that a particular order or relief will not, in accordance with settled principles, be granted. A refusal in such circumstances is in fact an exercise of jurisdiction and not a denial of it.

It would appear that the court does have jurisdiction not only to extend a writ even after its expiry, but also, in appropriate cases, to grant more than one such extensions. In *Ratnam v. Cumarasamy & Anor.* [1965] 31 MLJ 228 at p. 229 Lord Guest of the Privy Council said, *inter alia*:

> The Rules of Court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken **there must be some material upon which the court can exercise its discretion**. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. (emphasis added).

To support its application dated 16 April 2002, *inter alia*, for the renewal of the validity of the writ of summons dated 6 February 2001, the plaintiff relied on its affidavit dated 15 April 2002. Concerning its application dated 6 August 2002 for yet another renewal of the said writ, the plaintiff relied on its affidavit dated 5 August 2002. Presumably it was based upon the grounds averred to in the said two affidavits, that the learned deputy registrar exercised her discretion to grant, *inter alia*, the extensions of the said writ as prayed for in the two respective applications. The parties have submitted on the sufficiency or otherwise of those grounds, and I have considered those submissions. Having done so, it is my view that there was sufficient material upon which the learned deputy registrar could and did exercise her discretion to extend for two consecutive periods the validity of the writ of summons dated 6 February 2001 against both 2nd and 3rd defendants. There was in my view also sufficient material upon which the deputy registrar could and did exercise her discretion to, *inter alia*, extend the validity of the said writ for six months commencing from its expiry on 6 August 2002.

Plaintiff's Averments: Whether Scandalous, Irrelevant And/Or Oppressive

Earlier in their submission, the 2nd defendant objected to certain "offending paragraphs" in the plaintiff's counsel's affidavits in opposition dated 19 July 2002 (encl. 181) and 8 August 2002 (encl. 192). The 2nd defendant contends that the allegations in the said "offending paragraphs" are "scandalous, irrelevant and/or oppressive" and that "the said offending paragraphs" ought to be struck out from the plaintiff's said affidavits.

In para. 2 of the plaintiff's affidavit dated 19 July 2002 (encl. 181), the plaintiffs contend the 2nd defendant's SIC dated 1 July 2002 (encl. 178) "ought to be struck out for irregularity" as "there are no solicitors practising in ... Sarawak." This objection apparently relates to the 2nd defendant's reference to "Messrs. Arthur Lee, Lin & Co. Advocates," and "Idris & Co. Advocates" as solicitors in the said encl. 178. Now, the said usage of the term 'solicitor' by the 2nd defendant does not appear capable of causing so serious a consequence as to render "defective" the 2nd defendant's SIC dated 1 July 2002, thereby justifying an order for it to be "struck out". While the plaintiff's counsel is correct to the extent the Advocates Ordinance (Cap. 110) of Sarawak does not make any reference to 'solicitor', it would be awkward and impracticable for, say an advocate of Sarawak, to argue that the provisions under O. 64 of the RHC (as cited by the 2nd defendant's counsel) do not apply to him or her because he or she is not a 'solicitor'.

Enclosure 181 was done in connection with the 2nd defendant's application. Yet the plaintiff's counsel's allegations in para. 3 of that affidavit do appear to be directed at the 3rd defendant. The 2nd defendant says, the 3rd defendant "is merely the deponent to the 2nd defendant ... 3rd defendant is personally not involved at all in this (the 2nd defendant's) application." In that context, the said allegations in para. 3 do appear to be irrelevant and uncalled for.

In para. 8 of encl. 181, the plaintiff's counsel avers, that the "corporate veil" should be lifted, presumably because "the 3rd defendant has been the only deponent so far for the 1st and 2nd defendants ..." In para. 4 of encl. 181, the averment complained of is, *inter alia*, "... the 2nd defendant (who is the 3rd defendant for the matter) ..." This, according to the 2nd defendant, "unreasonably equated the 2nd defendant with the 3rd defendant ..." In para. 6 of encl. 181, the deponent, who is the plaintiff's advocate, appears to have raised issues pertaining to the 3rd defendant in an application involving the plaintiff and the 2nd defendant. Those allegations, the 2nd defendant says are "scandalous, irrelevant and/or oppressive."

Now, merely because the "3rd defendant has been the only deponent so far for the 1st and 2nd defendants," it does not conclusively mean "the 3rd defendant have (sic) the control on the 2nd (and the 1st defendant)," thereby justifying an uplifting of the corporate veil as submitted by the plaintiff's counsel. It is to be noted that in the case cited by the plaintiff, *Tjanting Handicraft Sdn. Bhd. & Anor. v. Utusan Melayu (Malaysia) Sdn. Bhd. & Ors.* [2002] 3 CLJ 571, the learned High Court judge, RK Nathan J made the decision to uplift the corporate veil based on "the evidence adduced." In that case the learned judge had seen and heard the witnesses including the 2nd plaintiff, and could, thereafter, conclude that "the 1st plaintiff is a non-entity without the 2nd plaintiff and, that the 2nd plaintiff "owns 9,999" of the 1st plaintiff's 10,000 ordinary shares. *Tjanting Handicraft Sdn. Bhd*. is, therefore, distinguishable from the instant case. In the circumstances, the 2nd defendant's contention, that "(t)here is no compelling reasons in the present case for the 'veil' to be lifted merely on the basis of bare allegations by the plaintiff," is tenable.

Concerning para. 4 of encl. 181, as submitted by the 2nd defendant, there seems to be no basis for equating the 2nd defendant with the 3rd defendant. Regarding the averments in para. 6 of encl. 181, I agree with the 2nd defendant's counsel's submission, that they purport to deal "with issue relating to the 3rd defendant when this is an application involving only the plaintiff and the 2nd defendant." The allegations therein do appear to be scandalous and/or irrelevant, particularly and including the averment, "It is clear exploitation of the Rules of the High Court (1980) as it was that which has enabled the deponent as the 3rd defendant

to avoid service so far." There is no probable evidence to support such allegations. The said paras. 3, 4, 6 and 8 of encl. 181, considered in the context of the proceedings, do appear to be scandalous, irrelevant and/or offensive, and would have to be struck out under O. 41 r. 6 of the RHC, which provides:

> The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

Paragraph 3 of the plaintiff's counsel's affidavit dated 8 August 2002 (encl. 192) states: "para. 3 of the said affidavit (of the 2nd defendant dated 25 July 2002) is an attempt to flog a dead horse." This averment, the 2nd defendant says, is "totally unnecessary and the manner of language is oppressive ..." With respect, this contention is tenable, and the said paragraph must also be struck out.

As to paras. 5 and 6 of the plaintiff's counsel's affidavit of encl. 192, it would appear tenable the contention of the 2nd defendant, that the allegations therein are "directed personally against the 3rd defendant and not relevant to the proceedings ..." Among the averments therein are: "It is inequitable to allow the 3rd defendant to depose an affidavit on behalf of the 2nd defendant when he has not entered appearance." The 2nd defendant says the 3rd defendant "has previously entered a conditional appearance," but subsequently the service on him of the relevant writ was set aside by the court. The 2nd defendant contends the allegations therein are oppressive, and totally uncalled for. Paragraph 8 of the same affidavit states, *inter alia*, "There is no provocation intended as alleged, but it may be seen in that manner by the deponent because he dare not appear before this Honourable Court in person!" The 2nd defendant submits not only is the said paragraph directed at the 3rd defendant personally, the allegations therein are also "scandalous" especially the phrase just quoted pertaining to the 3rd defendant not daring to appear before the court in person. The submissions by learned counsel for the 2nd defendant concerning the said paras. 5, 6 and 8 are tenable, and they would have to be struck out as well.

Conclusion

It was based on the grounds adumbrated above, that I ordered the application of each of the 2nd and 3rd defendants (encl. 178 and 230) to be dismissed with costs, that the offending paragraphs of the plaintiff's affidavits (encls. 181 and 192) be struck out, and that the defendants enter their respective defence within 14 days.